

DEVELOPMENTS IN INTERNATIONAL CRIMINAL LAW

FOREWORD

Many of the contributions to this issue of the *Journal* focus on several recent historic developments in the field of international criminal law. In July of 1998, the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) concluded an intensive five-week session in Rome by adopting a statute for such a court. Although the United States voted against the statute, its vote, as several contributions to this issue make clear, does not signal U.S. opposition to an international criminal court as such, but, rather, concern that certain features of the statute produced by the Rome Conference may undermine the achievement of other international goals that the United States believes are no less critical for world order and the international protection of human rights. The United States has been a firm supporter of the two existing international criminal courts—the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—and its support may prove just as crucial to the success of the ICC.

Despite the current U.S. opposition, it appears likely that the ICC will come into existence through the ratification of the statute by sixty states. Once established, such a court could affect the essential constitutive structure of world politics in a myriad of ways, particularly the work of the United Nations Security Council under its Chapter VII jurisdiction. The debates about whether such a court is a “good idea” are no longer relevant. The issues now on the table are how to make the court an effective instrument that will contribute to the maintenance and improvement of world order. One would expect the United States to be an active participant in the process.

The ICC will benefit from the experience of the two ad hoc international criminal Tribunals established by the UN Security Council in recent years, the ICTY and the ICTR. These Tribunals are engaged in establishing an international jurisprudence on the prosecution of individuals for violations of international criminal law. They have addressed not only substantive and procedural law related to such prosecutions, but also many of the logistical problems such international tribunals must face. The jurisprudence produced and lessons learned by these Tribunals will inevitably provide important foundations for the new ICC.

Perhaps even more significant is the fact that the Tribunals and the negotiations in Rome may reflect a dramatic development in the international community regarding the punishment of grave international crimes. While the Nuremberg and Tokyo Tribunals marked an important beginning, only now may we well be witnessing the emergence of consensus in the international community that it accepts the responsibility to prosecute and punish, be it through international or domestic tribunals, persons who commit such crimes.

In its first conviction, the ICTY found Duško Tadić guilty of war crimes and crimes against humanity arising in a noninternational conflict. Even more precedent setting was the *Akayesu* case, decided on September 2, 1998, by the ICTR. It was the first conviction by an international tribunal for the crime of genocide. It was followed by the conviction of Anto Furundžija for war crimes. The need to contemplate these hideous crimes can never be a cause for celebration. However, international lawyers and broad segments of the world community have long pressed, first, for the criminalization of genocide and crimes against humanity, and, second, for the international application of that law to the

individual perpetrators. With these convictions, their efforts have now produced tangible and important results. We hope that the more credible and soon more probable prospect of punishment will serve as a deterrent to others in the future.

In October 1998, General Augusto Pinochet, the former Chilean dictator, was arrested in London where he had traveled for medical treatment. His apprehension was based on a Spanish warrant seeking extradition under the European Convention on Extradition. The warrant alleges that he is responsible for crimes against both Spanish nationals and nationals of other countries. Whether or not the UK Government surrenders Pinochet to Spanish jurisdiction or allows him to return to Chile (a fact unknown at the time of this writing), this event sends a strong signal to perpetrators of grave human rights violations: the international affirmation of the punishment of grave violations of human rights is increasing and the number of territories in which such violators may escape judgment is shrinking. If such perpetrators' states of nationality do not prosecute them, travel abroad may indeed be risky. While this development appears to bode well for the promotion of human rights law, its ramifications regarding certain types of domestic efforts by troubled countries to move beyond the past toward national reconciliation and the realization of liberal ideals remain uncertain. Thought must also be given to preventing abuse of this universal jurisdiction. In part, the ICC may serve as the key to resolving these collateral issues.

Alas, the persisting inability of the UN Security Council to prevent or at least arrest the continuing atrocities in Kosovo makes clear that such recent or contemplated measures as the operation of an ad hoc criminal court (the ICTY), the establishment of a permanent tribunal and the reduction of zones of immunity are, in themselves, not a panacea. Other institutional arrangements, fueled by broad popular demands for justice, are as urgently required as ever. Until they are set in place, the ultimate bulwark against human rights violations may still be unilateral or plurilateral humanitarian intervention, or threats thereof, as demonstrated by the NATO initiatives in Kosovo. But they are remedies whose potential for abuse is well-known and their lawfulness under the UN Charter remains controversial. We are pleased that several aspects of this vexed subject are also addressed in this issue of the *Journal*.

THE EDITORS IN CHIEF

THE ROME CONFERENCE ON AN INTERNATIONAL CRIMINAL COURT: THE NEGOTIATING PROCESS

INTRODUCTION

The object of this paper is to describe the negotiating process during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. It is told from the perspective of those that were *ex officio* at the center of negotiations, as members of the Bureau of the Committee of the Whole (CW).¹ It describes the main issues under consideration at the conference and the evolution of the negotiations, including an inside view of the development of the final package containing the principal elements of the statute of the court.

¹ See *infra* notes 5 and 6.